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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. [redacted] 80

JOHN G. GETZ, JR.,
Respondent,

7481 *vs.*

CITY OF HARVEY,
a municipal corporation,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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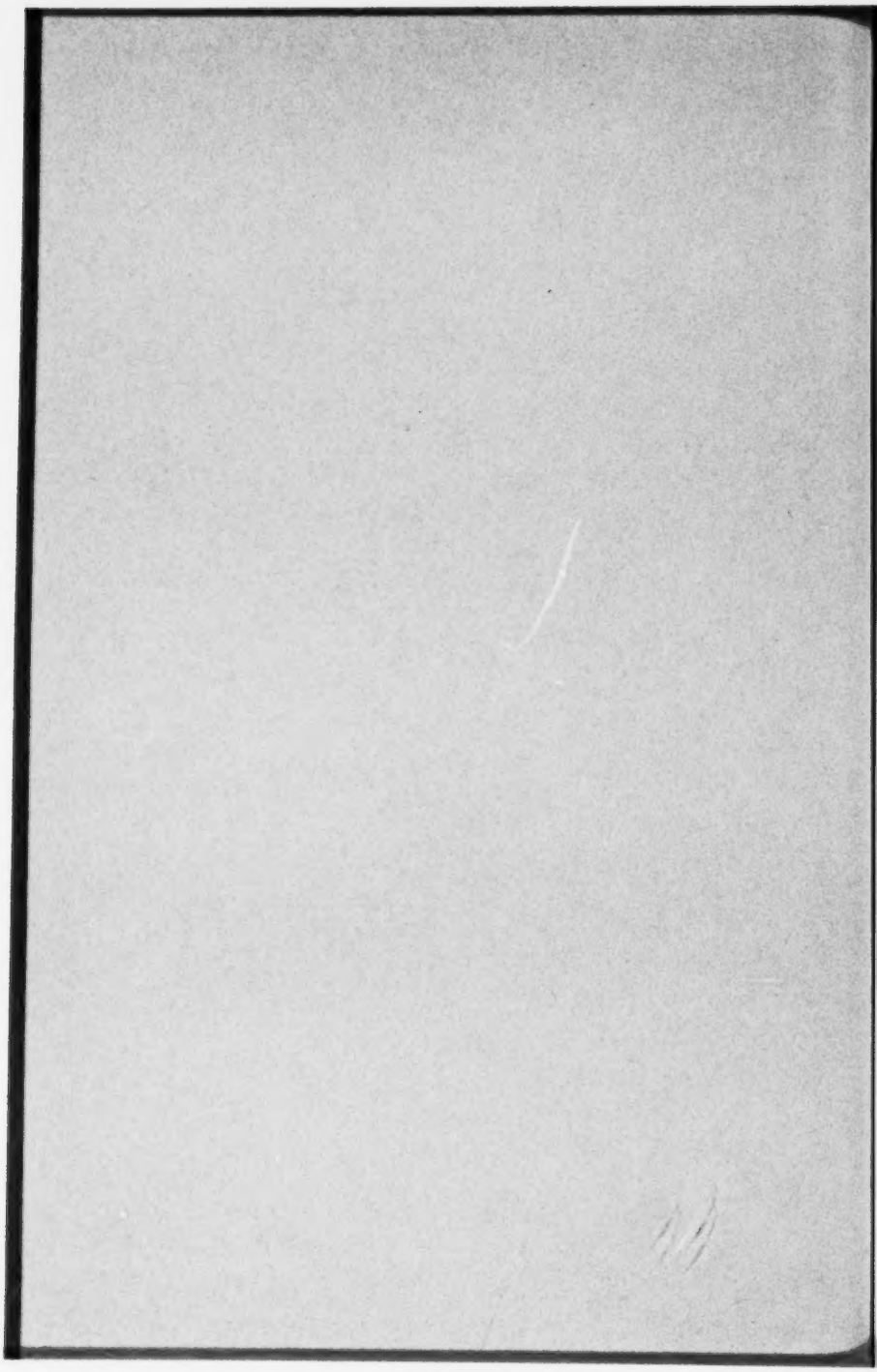

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No. 1039

JOHN G. GETZ, JR.,
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7481 *vs.*

CITY OF HARVEY,
a municipal corporation,
Petitioner.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

FOREWORD.

MAY IT PLEASE THE COURT:

The petitioner, City of Harvey, a municipal corporation, in the County of Cook and State of Illinois, organized under the commission form of municipal government of the Cities and Villages Act of the State of Illinois, prays for the issuance of a writ of certiorari directed to

the United States Circuit Court of Appeals for the Seventh Circuit to review that court's final decision and opinion relating to case No. 7481.

We respectfully submit that the only question presented is whether the City of Harvey was authorized under the provisions of the Act of April 22, 1899, to extend its existing waterworks system and to pay for such extension by the issuance of water fund certificates payable out of the proceeds arising from the earnings of the system as extended.

The master, the District Court, and the Circuit Court of Appeals each held that the certificates relating to Water Work System No. 2, being an extension of the existing system, were legal, valid and binding obligations payable out of the earnings of the water fund. The decision reached by each of the aforesaid was based on the same findings of fact.

> "Both courts below on a review of the evidence have found the facts in the same way. This court, under a settled rule, accepts such concurring findings unless clear error be shown. (Citing cases.) No such error is shown before us."
>
> *Bodkin* v. *Edwards,* 41 S. Ct. Rep. 268, 269; 255 U. S. 221, 223.

In their conclusions of law each of the aforesaid followed the decisions of the Illinois Supreme Court and the Illinois Appellate Court.

Jurisdictional Grounds.

Petitioner seeks to invoke the jurisdiction of this Court by virtue of the provisions of Section 240a of the Judicial Code, as amended. Petitioner, however, has failed to show any jurisdictional grounds as required by Rule 38, Subsection 5 (b) of the Rules of the Supreme Court of the United States.

The decision of the Circuit Court of Appeals is in strict conformity with the decisions of the Illinois Supreme and Illinois Appellate Courts.

Neither in the objections of petitioner to the Master's report (Tr. 86) nor in the Statement of Points relied upon in its appeal to the Circuit Court of Appeals (Tr. 125), nor in the contested issues stated in its brief in the Circuit Court of Appeals, was any question raised regarding the impairment of contract guaranteed by Article 2, Section 14 of the Constitution of the State of Illinois and Article 1, Section 10 of the Constitution of the United States. The facts in this case clearly establish that there was no impairment of the first issue water fund certificates either by the ordinances passed by the City of Harvey or in the allocation of the earnings of the Water Department. The injection of the alleged constitutional question at this time is obviously for the sole purpose of attempting to raise a federal question so as to invoke the jurisdiction of this Court.

SUMMARY OF ARGUMENT.

I.

Respondent's reply to petitioner's proposition:

"The authority for the City of Harvey to acquire two water systems and to create two water funds must be found in some act of the General Assembly or it does not exist."

A. The contention of the City of Harvey that it had no statutory power to extend or enlarge its water works system and to pay for such extension or enlargement by water fund certificates is based on the proposition that the City, having used the provisions of the Act of April 22, 1899, for purchasing the original system, it can no longer avail itself of the provisions of the Act for enlarging or extending that system.

1. The City of Harvey, on August 4, 1924, passed an ordinance in pursuance of the provisions of the Act of April 22, 1899, for the purchase of a water works system owned by the Public Service Company of Northern Illinois, payment of which was made by issuing water fund certificates of indebtedness in the sum of $200,000.00.

2. The City of Harvey, on January 31, 1927, passed an ordinance in pursuance of the provisions of the Act of April 22, 1899, for the enlargement and extension of its then existing water works system, payment of which was made by issuing water fund certificates of indebtedness in the sum of $350,000.00.

3. The City of Harvey, in the recitals of the ordinance approving plans for the construction of an enlargement or extension of its present system, declared that the duly constituted public authorities of the City had determined to avail themselves of the provisions of the Act for that purpose.

B. The City of Harvey, for the purpose of allocating the proportion of the moneys received and collected by the City as water rates for the consumption and the use of water for any and all purposes, designated a Special Water Fund No. 1 and a Special Water Fund No. 2.

1. The ordinances and the trust deed provided that the net proceeds were to be apportioned on the basis of the amount of water pumped through the respective systems. Intake meters were to be installed for that purpose.
2. The evidence shows no intake meters were installed to measure the water purchased from the City of Chicago; neither were any records kept pertaining to either special water fund.
3. The total net profits for the years 1924 to 1938 amounted to $744,633.84. Based on the average earnings of Water Works System No. 1, the total net profits allocable to System No. 1 amounted to $388,901.77; to System No. 2, $355,732.07.
4. The total principal and interest matured relating to System No. 1 amounted to $232,350.00. Only $175,225.00 was paid leaving in default principal and interest of $57,125.00.
5. The total principal and interest matured relating to System No. 2 amounted to $266,100.00. Only

$129,675.00 was paid, leaving in default principal and interest of $136,425.00.

6. Had the total principal and interest matured relating to both systems, amounting to $498,450.00 been paid out of the net earnings amounting to $744,633.84, there still would have been a surplus of $246,183.84 available for application on unmatured certificates.

C. The Act of April 22, 1899, as expressed in its title, authorizes a municipality not only to build or purchase a waterworks system, but also to extend an existing waterworks system.

1. Sections 1, 3 and 4 of the Act specifically provide that water fund certificates of indebtedness may be issued to pay for enlarging or extending an existing system, and that these certificates shall be paid out of the entire earnings.

2. The court in its opinion did not misapprehend the language of the Act of 1899 by considering words used in the singular as also being in the plural. Under the Illinois statutory rules of construction words importing the singular number may extend and be applied to several persons and things. (Ch. 131, Sec. 1, Subd. 3rd, Ill. Rev. Stats. 1939.)

3. The cases of *Ward* v. *Chicago,* 342 Ill. 167, and *Maffit* v. *Decatur,* 322 Ill. 82, have overruled the decision in the case of *Joliet* v. *Anderson,* 194 Ill. 457. These later cases hold that the entire net proceeds of the Water Department may be used to pay all outstanding securities.

4. The Circuit Court of Appeals in *Connett* v. *City of Jerseyville,* 96 Fed. (2d) 392, held that the Act of April 22, 1899, manifests an intention to protect the certificate holders by all reasonable means.

5. The case of *Simpson* v. *Highwood,* 372 Ill. 212, again approves the rule that the income from presently owned property, as well as that newly acquired, is properly used to pay outstanding water certificates, bonds, or contractual obligations.

II.

Respondent's reply to petitioner's proposition:

"A city cannot be estopped to deny the validity of a contract which it had no power to make, as a city cannot be given power to do unauthorized acts simply because it has done them and received the benefits."

A. The case of the *City of Corpus Christi* v. *Hayward,* 111 F. (2d) 637, cited by petitioner, is a case where the municipality did not conform to the requirements of the statute and issued bonds without the approval of a majority of the voters. Under these circumstances, the Court held the bonds void.

B. The case of *Bolton* v. *Wharton,* 163 S. C. 242, cited by petitioner, is a case where the municipality issued notes for promoting a silk mill. There was neither constitutional nor statutory authority for their issuance,—the notes were not issued for a corporate or public purpose.

C. The City of Harvey has always regarded the certificates issued in relation to Water Works System No. 2 as valid obligations.

1. The City so declared in the refunding ordinance.
2. The first time the legality of these certificates has been challenged is in the present lawsuit.

3. It would be unjust to permit the City of Harvey, by mere technical quibbling, to declare the certificates relating to System No. 2 invalid and in this manner enrich itself by taking System No. 2, representing an investment, made in good faith by the certificate holders, in the sum of $350,000.00, and by keeping the earned revenue in the sum of $355,832.07—trust funds—collected for the benefit of the certificate holders.
4. Petitioner has failed to show that the water fund certificates issued in payment of Water Work System No. 1 have been impaired in any manner whatsoever so as to invoke the jurisdiction of this Court for the purpose of reviewing the decision of the Circuit Court of Appeals for the Seventh Circuit.

D. The Master and the District Court sustained the validity of these water fund certificates on the theory of estoppel. The Circuit Court of Appeals held that the issuance of the certificates came within the purview of the Act of April 22, 1899 and also sustained their validity on the theory of estoppel.
   1. The case of *People* v. *Maxon,* 139 Ill. 306, holds that a municipality, having permitted third persons to take affirmative steps under an ordinance, would be estopped to deny the validity of that ordinance.
   2. The Circuit Court of Appeals in *Burlington* v. *Murphysboro* 96 Fed. (2d) 899, held that the trustee municipality would be estopped to set up its own wrongdoings.
   3. The Appellate Court of the State of Illinois, in *Cook* v. *City of Staunton,* 295 Ill. App. 111, also laid down the rule that a municipality will be estopped to set up as a defense its own irregularities in the execution of a power clearly granted.

ARGUMENT.

I.

Respondent's reply to petitioner's proposition:

> *"The authority for the City of Harvey to acquire two water systems and to create two water funds must be found in some act of the General Assembly or it does not exist."*

Petitioner's contention appears to be that since the Act of April 22, 1899, refers to a "water fund" it must be concluded that the Legislature intended and authorized but one water fund and one issue of certificates. We believe that the construction of the Circuit Court of Appeals of the Act of April 22, 1899, is a reasonable one and follows the construction placed upon that Act by the Supreme Court of the State of Illinois. The title of the Act authorizes cities, towns and villages "to build, purchase *or extend water works systems* for public and domestic use and to provide for the cost thereof." Obviously, the title of the Act suggests not a single system but *several systems.* The title not only contemplates the purchase of a water works system but also the *extension of an existing water works system.*

In Section 1 the Act states:

> "Every city, incorporated town and village in this state, is hereby authorized to acquire water works for supplying water for public use, * * * by building or purchasing of a water work system or *enlarging or extending an existing system.*"

This section further states:

> "In payment for such building, purchase *or enlargement* any such municipality *may issue certificates of indebtedness* limited in their payment solely to the water fund hereinafter provided for * * * and shall only be issued at not less than par value in payment for the building, purchase *or extension of a water work system.*"

In Section 3 it is provided:

> "Whenever any such municipality shall avail itself of the provisions of this act, *the entire proceeds* arising from the operation of the water works system thereof shall be paid into a fund known as the 'water fund' * * *."

Under Section 4 it is provided:

> "In order to secure in the most ample manner the payment of the water certificates authorized as aforesaid, any such municipality may convey by way of mortgage or deed of trust the water works so acquired, *or enlarged* * * *." (Italics ours.)

In the instant matter the City of Harvey, on August 4, 1924, passed Ordinance No. 852 which authorized the purchase of a water system owned by the Public Service Company of Northern Illinois (Tr. 684).* It was expressly provided in this ordinance as follows:

> "Any pipes, mains or extensions, which may hereafter be laid by said City, and which may be connected with said water distribution system, shall not be deemed to be a part of said distribution system, * * *." (Tr. 696.)*

On September 20, 1926, the City of Harvey passed Ordinance No. 954 (Tr. 516)* which was an ordinance approving plans for the construction of an enlargement or extension of its present system. On January 31, 1927, the City of Harvey passed Ordinance No. 976 (Tr. 505)*

* Reference hereafter is to transcript in case No. 1038.

authorizing the issuance of $350,000.00 water fund certificates for payment of the enlargement to the present system. The enlargement was designated as Water Works System No. 2. On the same day the City of Harvey passed Ordinance No. 974 (Tr. 524) which was an ordinance allocating the water revenues of the City of Harvey and creating two special water revenue funds. In the recital of this ordinance, after referring to the ordinance passed on September 20, 1926, it is stated:

> "And Whereas Also the said City of Harvey now owns and operates a water supply system designated as Water Supply System No. 1, *wholly inadequate in its capacity to serve the necessities of the City of Harvey;*
>
> "Now, therefore, be it ordained by the City Council of the City of Harvey, Illinois;
>
> "Section 1. That on and after the completion, acceptance and beginning of operation of Water Works System No. 2 all of the moneys received and collected by the City of Harvey as water rates and for the consumption and the use of water for any and all purposes be allocated to Special Water Fund No. 1 and to Special Water Fund No. 2 in the same proportion as the amount of water pumped into and through Water Works System No. 1 bears to the amount of water pumped into and through Water Works System No. 2, as shown by the intake meters to be maintained at said water works respectively.
>
> "Section 2. The moneys so to be deposited in said Special Water Fund No. 2 shall remain forever inviolate for the payment of the cost of operation and maintenance of said Water Supply System No. 2 and for the payment of the principal and interest of said Water Fund Certificates of Indebtedness and for no other purpose so long as any of said certificates remain unpaid" (Tr. 524-525). (Italics ours.)

Section 3 provided that that proportion of the total revenue which was to be deposited in Special Water Fund

No. 1 was to be used exclusively for the payment of the cost of operation and maintenance of Water Supply System No. 1, and for the payment of the remaining outstanding portion of an issue of water certificates of indebtedness issued for the purchase of Water Supply System No. 1. Section 3 then specifically provided as follows:

> "* * * and no part of said Special Water Fund No. 1 nor any part of the income arising from said Water Supply System No. 1 shall be used or is intended to be pledged for the payment of any part of the cost of operation or maintenance of said Water Supply System No. 2 or for the payment of any part of the principal or interest of the Water Fund Certificates of Indebtedness above referred to" (Tr. 525).

On April 8, 1927, the City of Harvey, by its Mayor, and attested by its City Clerk (Tr. 504), executed a mortgage deed of trust dated February 1, 1927, conveying to the Chicago Trust Company, as Trustee, the specific property known as Water Works System No. 2 (Pl. Ex. 1, Tr. 480). The cost of Water Works System No. 2 was $350,000. Water fund certificates in that amount were issued maturing over the period from February 1, 1931, to February 1, 1956 (Tr. 482). Under the covenants of the trust deed appears the following:

> "Ninth: The City further covenants and agrees that all the water revenues of the City shall be allocated to Special Water Fund No. 1 and to Special Water Fund No. 2 created by said ordinance passed January 31, 1927, in the proportion that the amount of water pumped into and through Water Works System No. 1 bears to the amount of water pumped into and through Water Works System No. 2 as shown by the intake meters to be maintained at said water works respectively and that the reading of said meters shall be checked in proportion as the area of the supply pipe to Water Works System No. 1 bears to the area of the supply pipe to Water Works System No. 2" (Tr. 497).

All of the water used or sold by the City of Harvey is purchased from the City of Chicago. Therefore, to determine the amount of water coming from the City of Chicago and passing through each of the systems the foregoing ordinances and trust deed provided for the installation of two separate meters. The evidence, however, discloses that the City of Harvey never installed a meter for System No. 1 or a meter for System No. 2. Only a single intake meter was installed (Tr. 261). Mr. Nugent, public accountant, testified that the Water Department did not keep any records pertaining to either special water fund No. 1 or special water fund No. 2 (Tr. 261). Consequently, the only method for allocation of the water funds that could be made from the records was based on the average earnings of Water Works System No. 1 during the period when it operated alone. The records show that during the two years that Water Works System No. 1 was operating by itself, the net earnings for the year 1924 amounted to $27,884.27, and for the year 1925 amounted to $25,297.16. The average earnings of Water Works System No. 1 based on these figures, were $26,591.71 annually. Plaintiff's Exhibit 415 (Tr. 667) shows the allocations of the net profits for each year to Water Works Systems No. 1 and No. 2. The totals are as follows:

Total net profits for the years
1924 to 1938, inclusive.....$744,633.84

Total net profits allocated to—
System No. 1 ..... 388,901.77
System No. 2 ..... 355,732.07 (Tr. 667).

The allocation of $388,901.77 as the net earnings of Water Works System No. 1 is eminently fair inasmuch as Water Works System No. 1 had been used previously for

many years and it is reasonable to assume that this system which was already deficient in 1924 and 1925, as declared by the City Council of the City of Harvey, became more inefficient as time went on. Thus, by allowing the net earnings as of the early dates to the whole period of time, it is not in any sense detrimental to the earning powers of Water Works System No. 1. Furthermore, this sum was more than adequate to meet principal and interest of the water fund certificates issued and made payable out of the funds earned by Water Works System No. 1.

The total principal matured to April 30, 1939, on the water fund certificates relating to Water Works System No. 1, amounted to $122,000; the interest coupons matured amounted to $110,350, or a total of principal and interest amounting to $232,350 (Tr. 623). The net earnings as shown above, allocated to Water Works System No. 1, total $388,901.77. Had these certificates been paid in full, a surplus of $156,551.77 would still have been available to be used in retiring unmatured water fund certificates relating to Water Works System No. 1. However, the evidence shows that the City of Harvey had paid only $175,225 toward the matured principal and interest, leaving in default as of April 30, 1939, $52,000 of principal of the water fund certificates and $5,125 of interest coupons matured, or a total of $57,125 (Tr. 623).

$355,732.07 was allocated to Water Works System No. 2. This sum was likewise far in excess of the requirements necessary to meet the principal and interest of the water fund certificates and coupons matured as of April 30, 1939, relating to Water Works System No. 2. The principal matured as of that date was $45,000, and the interest coupons matured amounted to $221,100, or a total of principal and interest of $266,100. Since $355,-

732.07 was available to meet the total sum of $266,100 for principal and interest, it is apparent that if these obligations had been paid there still would have remained a surplus of $89,632.07 which could have been applied toward the retirement of unmatured water fund certificates relating to Water Works System No. 2. The record, however, shows that only $129,675 was paid on principal and interest, thus leaving in default $30,000 of principal of the water fund certificates and $106,425 of interest coupons, or a total of $136,425 (Tr. 623).

It is quite apparent that the City Council of the City of Harvey at the time Water Works System No. 2 was in contemplation of construction and at the time the water fund certificates were issued, gave adequate consideration to the allocation of funds so that nothing detrimental would result to the water fund certificates that had been issued to pay for the purchase of the original system. Had intake meters been installed to each of the water mains of the respective systems, the basis of allocation provided for would have been a proper method of determining the amount of water passing through each system. Obviously, Water Works System No. 2 was not only necessary to increase the supply of water for public and domestic use, but as shown by the records of the Water Department of the City of Harvey, the actual income in most years was more than doubled.

As heretofore pointed out, when Water Works System No. 1 was operating alone, the net profit for the year 1924 was $27,884.27, and for the year 1925, $25,297.16. Immediately upon the beginning of operations of Water Works System No. 2, the net profits rose for the fiscal year 1926 to $44,686.03; in 1928 to $65,316.88, and in 1929 to $88,775.36. Had Water Works System No. 1 operated alone during the whole period of time involved in this

proceeding, the Water Department of the City of Harvey could have earned no more than $388,901.77 instead of $744,633.84, which it did earn by the combined systems.

Surely, the legislature did not intend, as counsel for appellant argues, that the entire proceeds arising from the operation of the combined water works systems could be used only to pay for the original system, where that system had been enlarged and extended so as to double its earnings. If counsel's theory were to prevail, it is manifest that the increased earnings in the sum of $355,-732.07 which resulted by reason of the increased capacity of Water Works System No. 2 would be available only for payment of the certificates first issued, and any certificates subsequently issued to pay for enlargements or extensions would be, as he states, invalid and void. Thus, under this line of reasoning, instead of Water Works System No. 1 having a water fund of $388,901.77, it would have a fund of $744,633.84 obtained, not by reason of the earnings of that system, but because of the earnings of System No. 2. The injustice of such a situation to the holders of water fund certificates relating to System No. 2 is so apparent that further argument seems wholly unnecessary. However, in the recent cases decided by the Illinois Supreme Court, the contention that the earnings of a water system must be limited solely to the payment of the certificates first issued has been repudiated.

The contention that the proceeds of a water works system cannot be pledged for the payment of subsequently issued water fund certificates is based by its proponents on the decision in the case of *City of Joliet* v. *Alexander*, 194 Ill. 457. That case, however, has been distinguished by the Illinois Supreme Court in the case of *Ward* v. *City of Chicago*, 342 Ill. 167, 173; and the ruling in that case was followed by the Circuit Court of Appeals in the

case of *City of Jerseyville* v. *Connett,* 49 Fed. (2d) 246. The Illinois Supreme Court in the *Ward* case, after having referred to the *City of Joliet* v. *Alexander* case, on page 174 stated the following:

> "* * * Counsel for appellant in the present case lay considerable stress upon certain language of the opinion to the effect that indebtedness within such constitutional prohibition may be created by pledging an existing income of the city, arguing that in the present case there can be no way of determining how much income would be attributable to the enlargement of the system when made or how much would be attributable to the new rates to be put into effect; that the so-called new income cannot be segregated from the present income; that the present income will thereby be taken away and lost, and that so cutting off and pledging it will create an indebtedness within the meaning of the language invoked. The position thus taken seems to be that pledging the water fund creates indebtedness within the contitutional prohibition unless the pledge is confined to such precise income as can be directly traced to the particular new physical element of the plant to pay for which the obligation secured was issued, leaving the original income in effect intact and usable by the city for other purposes altogether. *The Decatur case is decisive against the soundness of such a position. There the income from the original plant was in effect cut off and lumped into the fund resulting from the operation of the plant as enlarged.* It is not apparent that any effort was there made to preserve such original income intact or exempt it in any manner or degree from the claim of the water company, or that moneys made available to the water company under the contract were at all limited to income traceable to the elements of the plant which it had financed." (Italics ours.)
>
> *Ward* v. *City of Chicago,* 342 Ill. 167, 174.

The record in the case at bar indicates that full consideration was given by the City Council of the City

of Harvey to the allocation of the respective proportions of the net income to each of the water works systems. That such allocations were not made was due to the fault of the officials of the City of Harvey and is not chargeable to the certificate holders. However, in view of the foregoing statement by the Illinois Supreme Court, the fact of allocating the funds to each system is immaterial since the entire proceeds have been held by the Court to be available for the payment of all outstanding water fund certificates. In all the recent cases before the Illinois Supreme Court involving water fund certificates or bonds, the Court has liberally construed acts of the legislature which authorize the building, purchase, enlargement or extension of water works systems and the Court has refused to uphold any technical interpretations which seek to defeat the payment of just obligations that have been issued by municipalities for the payment of such water works systems, extensions or enlargements.

The Circuit Court of Appeals in construing the object of the Act of April 22, 1899, in the case of *Connett* v. *City of Jerseyville,* 96 Fed. (2d) 392, on page 398 stated the following:

> "* * * The object of the Act was for the benefit of the public, in this particular case for the benefit of Jerseyville. It not only authorized appellee to construct a much needed water system, but it provided means by which it could establish a sufficient credit with which to finance the project. Without the latter the former would be of no avail. Without protection to the moneylender the latter could not be accomplished. *With this thought in view the entire Act clearly manifests an intention to protect the certificate holders by all reasonable means until the certificates are fully paid.*" (Italics ours.)
>
> *Connett* v. *Jerseyville,* 96 Fed. (2d) 392, 398.

It is quite inconceivable that this Court or any Court would construe the Act of April 22, 1899, to mean that a municipality, once having used the Act to authorize the purchase of a water works system and to pay for that system by issuing water fund certificates, that thereafter, the municipality could not again avail itself of the Act to enlarge that system until the first indebtedness had been paid. The Act of April 22, 1899, specifically contemplates growth and expansion. A municipality is authorized to build or purchase a water works system and then, as the municipality grows and its needs increase, extensions or enlargements to its existing system are specifically authorized. The facts in the case at bar show the common sense application of the powers authorized by the Act of April 22, 1899. The growth of the City of Harvey and the need for additional facilities is proved by the increased revenue earned by the combined systems. This increased revenue, as the evidence shows, was more than adequate to pay the water fund certificates, principal and interest of both systems, as they annually matured.

Petitioner contends that the allocation of the water revenues as provided by ordinance No. 974 of the City of Harvey was not authorized by Section 3 of the Act of April 22, 1899 (Pl. Ex. 3, Tr. 524). Since the ordinance was entirely ignored by the officials of the City of Harvey and no allocation was made whatsoever pursuant to the provisions of that ordinance, it is unnecessary to consider whether or not the allocation or assignment was proper. The allocation made by the accountant, as we have heretofore indicated, more than protected the rights of the certificate holders whose certificates related to Water Works System No. 1. Furthermore, the Circuit Court of Appeals has only followed the rule of the

Illinois Supreme Court approving payment of water fund certificates out of the net earnings of the entire proceeds of the Water Department without allocation, so long as the outstanding obligations are paid without prejudice to the rights of prior issues.

In the case of *City of Jerseyville* v. *Connett*, 49 Fed. (2d) 246, on page 249, the Circuit Court of Appeals in recognizing and approving the Illinois Supreme Court rule, stated the following:

> "* * * But the Ward case is distinctly antagonistic to that part of the decision in the Joliet case where it is said that the pledging of the income from the old plant for the payment of water fund certificates issued for enlargement or extension constituted the certificates an indebtedness of the municipality within the constitutional provision."
>
> *Jerseyville* v. *Connett*, 49 Fed. (2d) 246, 249.

In the recent case of *Simpson* v. *City of Highwood*, 372 Ill. 212, on page 221, the Illinois Supreme Court has reaffirmed this principle:

> "The contention that the ordinance for the project and bond issue is void because it pledges property and income and, as such, involves an indebtedness in excess of the constitutional and statutory limitations, is answered adversely in *Maffit* v. *City of Decatur*, 322 Ill. 82, and *Ward* v. *City of Chicago*, 342 *id.* 167. In each of those cases, *the income from presently owned property, as well as that newly acquired, was*, by contract in the *Maffit* case, and by ordinance in the *Ward* case, to be put into a special fund and used to pay, in the *Ward* case, water revenue certificates, and in the *Maffit* case, the contracting water supply company." (Italics ours.)
>
> *Simpson* v. *Highwood*, 372 Ill. 212, 221.

It is manifest from the decisions of the Illinois Supreme Court, that the entire proceeds arising from the

operation of the water works system as a whole are subject to the payment of, first, the necessary operating expenses of such water works system, and, second, to the payment of the certificates issued and the interest accrued thereon. In the instant matter, as the undisputed evidence shows, the net earnings applicable to the payment of principal and interest of outstanding water fund certificates relating to both water works systems were more than enough to pay all matured principal and interest and have a substantial surplus after such payment. The surplus could have been, and should have been, applied to the retirement of unmatured certificates.

On page 17 of the petition counsel refers to the case of *People* v. *Orvis,* 374 Ill. 536. This case has no application to the instant matter. In a prior case entitled *People* v. *Orvis,* 358 Ill. 408, the Supreme Court of Illinois held that certain claims incurred by the school district in completing a school building and in furnishing equipment were in excess of the statutory debt limit and therefore illegal. Subsequently the Legislature sought to validate these claims. In the latter case (374 Ill. 536) the Supreme Court held that the Legislature had no power to validate debts which were invalid by reason of their exceeding the statutory debt limit. This question is obviously not present in the case at bar.

On page 18 counsel for petitioner states:

> "The court in its opinion misapprehends the language of the Act of 1899 and applies the Act as though the word system appears in the plural, whereas in fact, the word system appears in the singular throughout the body of the Act, and appears in the plural only in the title of the Act, where the words 'Cities, Villages and Towns' appear in the plural."

We submit that the Circuit Court of Appeals did not misapprehend the language of the Act of 1899 and in con-

struing the singular words followed the rules of construction as set forth in Chapter 131, Section 1, Illinois Revised Statutes, 1939. This chapter, entitled "Construction of Statutes", provides the general rules which shall be observed in the construction of all statutes now in force. Pertinent to the question raised by counsel are the following:

> "First—All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the Legislature may be carried out.
>
> "Second—Words in the present tense include the future.
>
> "Third—Words importing the singular number may extend and be applied to several persons and things and words importing the plural number may include the singular."

We respectfully submit that the construction placed upon the Act of April 22, 1899, by the Circuit Court of Appeals is the only reasonable and logical construction that can be made and is fully supported by the Illinois decisions referred to in the Circuit Court of Appeals' opinion.

II.

Respondent's reply to petitioner's proposition:

> *"A city cannot be estopped to deny the validity of a contract which it had no power to make, as a city cannot be given power to do unauthorized acts simply because it has done them and received the benefits."*

Counsel for petitioner, in support of the proposition stated under this second point, relies primarily on the case of *City of Corpus Christi* v. *Hayward,* 111 F. (2d) 637, and the case of *Bolton* v. *Wharton,* 163 S. C. 242; 86 A. L. R. 1101. The facts in these cases clearly dis-

tinguish them from the case at bar. In the case of *City of Corpus Christi* v. *Hayward,* 111 F. (2d) 637, the Court, on page 639, stated the following:

> "The decision of the case on the merits requires construing Article 1112, *supra,* since the city contends *that the bonds are invalid because the issues were not submitted to and approved by a majority vote of the qualified electors thereof, but were authorized only by an ordinance of the city council.*" (Italics ours.)

Under Article 1112 the municipality was prohibited from encumbering the water system for more than $5,000 unless such encumbrance had been authorized by a majority of the qualified voters of the municipality. There were exceptions, however, which did not require the approval of a majority of the voters, and these exceptions were for "purchase money, or for extensions, or to refund any existing indebtedness".

The facts in the *Corpus Christi* case disclosed that the construction for which the bonds had been issued was for the purpose of improvements rather than extensions, and, therefore, were unauthorized unless approved by a majority of the qualified voters. Since there was no such approval, the Court held the bonds void. No such question is presented in the case at bar. The evidence shows, and there is no dispute about the fact, that the City of Harvey with meticulous care had followed the procedure set forth in the Act of April 22, 1899, authorizing the issuance of water fund certificates in payment of Water Works System No. 2. A history of the city's procedure is set forth in plaintiff's Exhibit 1 (Tr. 480-485). Furthermore, in the ordinance authorizing and providing for the refunding of the water fund certificates relating to Water Works System No. 1 and System No. 2,

passed by the City Council of the City of Harvey on the 25th day of January, 1937, the following appears in the recitals:

> "Whereas, *the City of Harvey, Illinois, did heretofore and prior to July 1, 1935, authorize, issue, sell and deliver in manner and form provided by law its water fund certificates of indebtedness* in the principal amount of $200,000, dated September 15, 1924, bearing interest at the rate of five per cent per annum, of which there are now outstanding and unpaid said water fund certificates in the total amount of $129,000 and interest accrued thereon since March 15, 1935; and
>
> "Whereas, *said City did also heretofore and prior to July 1, 1935, authorize, issue, sell and deliver, in manner and form provided by law, its water fund certificates of indebtedness* in the principal amount of $350,000, dated February 1, 1927, bearing interest at the rate of five and one-half per cent per annum, of which there are now outstanding and unpaid said water fund certificates of indebtedness in the total principal amount of $335,000 and interest accrued thereon since February 1, 1933." (Def. Ex. 2, Tr. 702.) (Italics ours.)

No distinction was made by the City of Harvey in describing the issue relating to Water Works System No. 1 and the issue relating to Water Works System No. 2. Both issues were declared to have been authorized, issued, sold and delivered as provided by law. At the time that ordinance was passed, and at all times, except for the purposes of this lawsuit, the City has always recognized the water fund certificates issued in payment of Water Fund System No. 2 to be legal, valid and binding obligations. Subsequent to the passage of the refunding ordinance, the City, as the record shows, has expended $65,000 of the water funds in the acquisition of these certificates, again affirming their validity (Tr. 701).

The refunding ordinance was passed on January 25, 1937, and on June 20, 1939, after this suit was pending, and, as a matter of fact, for the purpose of eliminating the Reconstruction Finance Corporation as a co-plaintiff in this litigation, $20,000.00 of the water fund certificates held by the Reconstruction Finance Corporation were purchased at the price of $22,000.00 by the diversion of water funds (Tr. 701). From these facts, the good faith of the petitioner in asserting that the water fund certificates are illegal is highly questionable.

The case of *Bolton* v. *Wharton,* 163 S. C. 242; 86 A. L. R. 1101, cited by petitioner, clearly demonstrates the rule which appellant relies upon but which has no application to the facts in the instant matter. In that case, Judge Sease of the Trial Court in his statement of the facts, on page 1104, said:

> "It appears from the testimony that in the early part of the year 1927 one Sidney M. Edelstein was in the City of Union as an industrial promoter and was endeavoring to locate a silk mill in the said city. The matter of the city council assisting in the location of such mill was taken up with the said council several times by the said Edelstein, as shown by the minutes of such council in evidence; the said minutes going back as far as January 10, 1927. Finally, at a meeting on April 28, 1927, the council accepted the plan as outlined by Mr. Edelstein 'that the City enter into a contract with him to execute notes for $45,000, payable at the expiration of twelve months in promotion of the aforesaid silk mill.'"

The decision of the Court was that there was neither constitutional nor statutory authority for a city to issue notes for the promotion of a private enterprise. On page 1109 the Court stated:

> "Now under the Constitution and laws of this state, a municipal corporation is authorized to issue

only two types of evidences of indebtedness: One, tax anticipation notes, as authorized by section 4554 of Civil Code (1922); and the other, bonds."

The Court then discusses the character of tax anticipation notes and of bonds, and comes to the conclusion that the notes issued do not come within either classification, and says, on page 1111:

"* * * that these attempted obligations were for *no corporate or public purpose* and were null and void." (Italics ours.)

Bolton v. *Wharton*, 163, S. C. 242; 86 A. L. R. 1101, 1104, 1109, 1111.

On appeal, the decision of the Court below was affirmed and Judge Sease's opinion was adopted.

There is obviously no analogy between the *Bolton* case and the case at bar. The water fund certificates issued by the City of Harvey were not only for a corporate purpose, but were authorized by the Act of April 22, 1899.

Petitioner has failed to cite a single Illinois Supreme or Appellate Court decision in support of its contentions that has any application to the issues decided by the Circuit Court of Appeals. On the other hand, the decision of the Circuit Court of Appeals is fully sustained by the Illinois authorities on every question presented. Furthermore, petitioner has failed to show that the water fund certificates issued in payment of Water Work System No. 1 have been impaired in any manner whatsoever so as to invoke the jurisdiction of this Court for the purpose of reviewing the decision of the Circuit Court of Appeals for the Seventh Circuit.

Water Works System No. 2 was constructed at a cost of $350,000 for which water fund certificates were issued. Out of the total net earnings, at least $355,732.07 is

allocable to Water Works System No. 2. Water Works System No. 2 is trust property and the earnings allocable to that system are trust funds, all of which have been pledged and are to be used for the payment of outstanding certificates. Certainly it would not be in furtherance of justice if the City of Harvey were permitted, by mere technical quibbling, to enrich itself to the extent of over $700,000 by taking Water Works System No. 2, representing an investment made in good faith by certificate holders in the sum of $350,000, and by keeping the sum of $355,832.07 collected as earned revenue trust funds, held for the benefit of the certificate holders, simply by the City declaring that it had no right to issue the certificates when, under the law and the facts, the City did have the right.

In the early case of *Burr* v. *City of Carbondale,* 76 Ill. 455, the court on page 469 stated the following:

> "The principle has always been acknowledged by this and other courts, that the acts of a municipality done under a power, and in substantial conformity to the power, are binding * * * * * *.
>
> "So, by parity of reasoning and analogy, if a municipal corporation, authorized by law, issue its bonds in furtherance of a corporate purpose, and in substantial compliance with the law authorizing their issue, and such bonds come into the hands of an innocent holder, even if there be irregularities not going to the power, the bonds must be held valid. If the power existed, the act is binding * * * * * *. Where the power to issue bonds existed, the corporation is estopped from setting up irregularities in the issue of the bonds after repeated payments of interest thereon."

On page 478 the Court concluded:

> *"No charge of fraud, combination or oppression is made. Every act seems to have been fairly done, and in pursuance of law. The disreputable feature*

of the case is, that the same authority doing all these acts, and whose city has received the benefit of them, now seeks to repudiate them. There is no rule of law, equity, justice or morals compelling this, and we cannot sanction it." (Italics ours.)

Burr v. *Carbondale*, 76 Ill. 455, 469, 478.

The Master, in his report, sustained the validity of the water fund certificates of indebtedness on the theory of estoppel. We believe that the issuance of the water fund certificates in payment of Water Works System No. 2 comes within the purview of the Act of April 22nd, 1899, and the validity of these certificates is not dependent upon the doctrine of estoppel. However, if there were some question as to any irregularity, the certificates having been authorized by statute, and the procedure for their issuance under the provisions of the Act of April 22nd, 1899, having been scrupulously observed by the City Council, the City of Harvey, in view of its conduct and its subsequent acts as hereinabove referred to, is obviously estopped to deny their validity.

In the case of *People ex rel.* v. *Maxon*, 139 Ill. 306, the Village of Colfax by its President and Board of Trustees attempted to pass an ordinance disconnecting certain territory which had formerly been within its boundaries. The ordinance received a majority of the votes of the members present, but not a majority of all of the members elect which was requisite under the statute. The ordinance, therefore, was never legally passed. It was, however, published and recognized as valid by the officers of the Village and the officers of the township in which the territory lay. The township took charge of the territory, levied taxes upon it, worked the roads, built a bridge, etc. The territory so attempted to be disconnected was recognized and treated by both the Village and township as not being a part of the

Village until the 5th day of August, 1889, when the President and Board of Trustees of the Village passed an ordinance levying a tax upon the real and personal property within its limit for corporate purposes. Demand was made upon Maxon, who was County Clerk, to extend the taxes and upon his refusal, a writ of mandamus issued to compel him to extend such taxes. No defense was made by Maxon, but the commissioners of highways of the township, by leave of court, became parties and set up the aforesaid facts relating to the township having taken over jurisdiction of the disconnected territory. The lower court gave judgment for the defendants. The Appellate Court affirmed the judgment, holding that the Village was estopped to deny the validity of said ordinance under the decisions of the Supreme Court, citing *Chicago, Rock Island & Pacific Railroad Company* v. *Joliet,* 79 Ill. 25, and *Lee* v. *Mound Station,* 118 Ill. 304. On appeal to the Supreme Court the Appellate Court judgment was affirmed, and on page 310 the Court stated:

> "We entertained no doubt that on the authorities cited by the Appellate Court, as well as upon reason and justice, the Village is estopped from claiming any power over the territory in question, as being within its limits."
>
> *People* v. *Maxon,* 139 Ill. 306, 310.

The rule announced in *People* v. *Maxon, supra,* was reasserted in the case of *Webster* v. *Toulon School District,* 313 Ill. 541, 548.

The Circuit Court of Appeals in *Bank of Burlington* v. *Murphysboro,* 96 Fed. (2d) 899, on page 904, stated:

> "* * * we are of the opinion that *the trustee municipality is estopped to set up its own wrongdoing to justify its refusal to account for and pay over trust funds which it has collected for the benefit of*

the claimant, who, in equity and good conscience, is entitled to be paid." (Italics ours.)

Burlington v. *Murphysboro,* 96 Fed. (2d) 899, 904.

This same rule was applied by the Appellate Court of the State of Illinois in the case of *Cook* v. *City of Staunton,* 295 Ill. App. 111. On page 118, the Court stated:

"The discrepancies in the issuing of the bonds and the failure to comply strictly with the provisions of the statute, as pointed out by appellant, are at most irregularities which might be taken advantage of by one against whose property a special assessment was levied, *but not by the city issuing the bonds that wilfully or negligently failed to apply toward the discharge of its obligations the funds collected by it for that purpose.* There is a distinction between contracts which are *ultra vires* and contracts which are within the power of the city to make but which have been irregularly or illegally made but have been performed in good faith. *Notwithstanding such irregularities in the issuing of the bonds the city has collected the assessments levied with which to pay said bonds and interest thereon, and paid in full all of the bonds of the first six series, and none are outstanding, and is estopped to set up as a defense in a suit instituted for the collection of such bonds as are outstanding its own irregularities in the execution of a power clearly granted it.*" (Italics ours.)

Cook v. *City of Staunton,* 295 Ill. App. 111, 118.

Chicago v. *McGovern,* 226 Ill. 403.

McGovern v. *Chicago,* 281 Ill. 264, 280.

CONCLUSION.

It is manifest from the record in this case that the petitioner, the City of Harvey, has shown no legal grounds entitling it to a review, by this court, of the decision of the Circuit Court of Appeals for the Seventh Circuit.

WHEREFORE, respondent respectfully prays that the application for writ of certiorari be denied.

Respectfully submitted,

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